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No. 96-270

IN THE
Supreme Court of the United States

OCTOBER TERM, 1996

AMCHEM PRODUCTS, INC., *et al.*
Petitioners,

v.

GEORGE WINDSOR, *et al.*
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF LAW PROFESSORS IN SUPPORT OF RESPONDENTS

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MOTION OF LAW PROFESSORS FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE*

Pursuant to rule 37.3 of the Rules of this Court, the professors of law who are signatories to the accompanying brief move for leave to file it as *amici curiae*.

Amici are professors at law schools in the United States who are concerned that, unless the decision of the Third Circuit is affirmed, absent plaintiffs in class actions throughout the country will be denied due process of law. As scholars of the federal courts, the rules of civil procedure, and legal ethics, Amici's sole interest is to ensure that the procedural system facilitates the enjoyment of substantive legal rights fairly, efficiently, and expeditiously. Amici have no stake in the present controversy. Amici therefore offer a perspective different from that of the parties in this case. Amici file this Brief because we believe that Petitioners' proposed application of Federal Rule of Civil Procedure 23 would endanger absent class members by weakening the incentives plaintiffs' attorneys have to maximize the value of their claims, by encouraging collusive settlements judges will have difficulty policing, and by ignoring important respects in which some absent plaintiffs' interests conflict with those of others.

Consent letters were received from all but one of the parties and no party affirmatively objected. However, because of time constraints, the law professors had not yet received written consent from all parties at the time of the filing of this brief. Accordingly, the law professors move for leave to file the accompanying brief as *amici curiae*.

January 15, 1997

Respectfully submitted,

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INTEREST OF AMICI

Amici are professors at law schools in the United States who are concerned that, unless the decision of the Third Circuit is affirmed, absent plaintiffs in class actions throughout the country will be denied due process of law.[1] As scholars of the federal courts, the rules of civil procedure, and legal ethics, Amici's sole interest is to ensure that the procedural system facilitates the enjoyment of substantive legal rights fairly, efficiently, and expeditiously. Amici have received no compensation or promise of compensation for submitting this Brief. Amici file this Brief because we believe that Petitioners' proposed application of Federal Rule of Civil Procedure 23 would impede the proper operation of the procedural system. It would endanger absent class members by weakening the incentives plaintiffs' attorneys have to maximize the value of their claims, by encouraging collusive settlements judges will have difficulty policing, and by ignoring important respects in which some absent plaintiffs' interests conflict with others'. Permitting a class action to proceed in the face of these defects would undermine this Court's holding in *Hansberry v. Lee*, 311 U.S. 32 (1940), that absent plaintiffs cannot be bound by a prior proceeding unless they are adequately represented.

SUMMARY OF ARGUMENT

Rule 23 of the Federal Rules of Civil Procedure creates a single set of certification requirements that applies to all class actions, including those that are tried and those that settle. When absent plaintiffs are sufficiently numerous, when common questions of law or fact predominate over individual ones, when named plaintiffs and their attorneys are adequate representatives, and when the other Rule 23 requirements are met, a class can be

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[1] A complete list of the signatories to this brief and their law school affiliations is attached as an appendix.

certified and a named plaintiff can stand in judgment on an absent plaintiff's behalf. Whether the requirements are met depends in all cases upon the actual litigation facts. When absent plaintiffs are few, when individual questions predominate, when named plaintiffs and their attorneys are inadequate representatives, certification is not permitted under the rule. Unless the actual litigation facts support certification, a lawsuit can be neither tried nor settled as a class.

A proposed settlement agreement between a named plaintiff or a named plaintiff's attorney and a defendant cannot cure a defect that would otherwise prevent certification of a class. A contrary rule would render the limiting portions of Rule 23 ineffective by grounding the certification decision in a world of make-believe. If absent plaintiffs were too few in number to certify a class, a contrary-to-fact stipulation in a settlement agreement would establish otherwise. If predominant common questions were lacking, a contrary-to-fact settlement agreement would create them. If the interests of the named plaintiffs or their attorneys were in conflict with those of the absent plaintiffs, this difficulty too would be dealt with by an agreement stating otherwise and the trial court would find the harmony of interests that Rule 23 requires. When settlement agreements can turn fiction into fact, there can be nothing left of the constraints imposed by Rule 23.

Petitioners' argue that judges should take contrary-to-fact settlement stipulations into account when deciding whether to certify class actions. If this Court were to accept that argument, it would put absent plaintiffs at the mercy of named plaintiffs, their attorneys, and defendants, whose ability to extinguish their rights via inadequate and possibly collusive settlements would be unconstrained. Settlement sell-outs would be encouraged because plaintiffs' attorneys would lack incentives to maximize

the value of absent plaintiffs' claims, because named plaintiffs would fail to speak for absent plaintiffs' diverse interests as they should, and because defendants would benefit by paying less than absent plaintiffs' claims are worth. Absent plaintiffs would be represented by unfaithful champions and bound without due process of law in violation of *Hansberry v. Lee*, 311 U.S. 32 (1940).

ARGUMENT

I. RULE 23'S CERTIFICATION CRITERIA CANNOT BE SATISFIED BY CONTRARY-TO-FACT STIPULATIONS OF THE NAMED PARTIES

Concern to ensure due process is the hallmark of class action jurisprudence and must be the hallmark of class action practice. Ordinarily, due process permits only a person joined and served as a party (or in privity with such a person) to be bound by a judgment. Class actions are an exception to this rule. All members of a class are bound by a judgment on a theory of virtual or vicarious representation. Because class actions deprive plaintiffs of their individual day in court, class actions have been permitted only when rigorous due process protections are met. Only then can there be sufficient assurance that absent plaintiffs will be adequately represented before their legal rights are extinguished.

To appreciate fully the importance of due process protections, one must understand that the only true parties to a class action are the named plaintiffs and the named defendants. Absent class members are not true parties, although that label is sometimes loosely applied to them. They are non-parties whose interests are represented by others acting under authority of the federal rules. *Kamilewicz v. Bank of Boston Corp.*, 100 F.3d

1348, 1352 (7th Cir., 1996) (Easterbrook, J., joined by Posner, C.J., and Manion, Rovner, and Wood, J.J., dissenting from denial of rehearing en banc) ("Absent class members are represented by the named plaintiffs and their lawyers, but they aren't parties"). *See also* Diane Wood Hutchinson, *Class Actions: Joinder or Representation Device?*, S. CT. REV. 459 (1983) (explaining that absent plaintiffs are not joined as parties under Rule 23).[2]

Named parties gain the power to represent and bind absent plaintiffs by satisfying the requirements of Rule 23. That is what class certification is all about. It determines whether a named plaintiff and an attorney representing a named plaintiff can make decisions for and stand in judgment on behalf of a group of absent plaintiffs. When certification is denied, a named plaintiff

[2]Because absent plaintiffs are not true parties, the contention that the Third Circuit's approach violates the Rules Enabling Act or is otherwise objectionable because it prevents litigants from settling is wholly lacking in merit. See, e.g., Brief for Rhone-Poulenc Rorer, Inc. et al. as Amici Curiae in Support of Petitioners, at p. 7. The Third Circuit's opinion leaves *parties*, i.e., named plaintiffs and named defendants, free to settle at their pleasure. What it limits is the freedom named parties have to represent and bind others, namely, absent plaintiffs. That, obviously, is something named parties have no inherent right or power to do.

Ironically, the Enabling Act issue in this case is raised by Petitioners' effort to convert Rule 23(b)(3) into a means by which the tort rights of a vast number of current and future victims of asbestos-related illnesses, which are governed by diverse bodies of state law, are subjected to a single legal rule and extinguished. It is doubtful that the rulemaking power of the Court can lawfully or wisely be employed to enact or interpret a rule so replete with substantive consequences and having so little to do with the decision of cases or controversies. See Paul D. Carrington & Derek Apanovitch, *The Constitutional Limits of Judicial Rulemaking: The Invalidity of Proposed Rule 23(b)(4)*, ARIZ. L. REV. (forthcoming 1997).

and a lawyer acting for a named plaintiff can take few actions that bind absent plaintiffs. When certification is granted, a named plaintiff and plaintiff's counsel can make many decisions for absent plaintiffs and can conduct a lawsuit that may extinguish their rights.

Rule 23 thus creates and regulates a relationship at law between a named plaintiff and an attorney, on the one hand, and a group of absent plaintiffs, on the other. It authorizes the former to speak and act for the latter. It does so, however, in limited circumstances. The named plaintiff must be a member of the class to be represented. The absent plaintiffs must be too numerous to join by other means. The claims of the named plaintiff and the absent plaintiffs must involve predominant common questions of fact or law. The named plaintiff must be typical and must adequately represent the class. And a class action must be the superior means of processing the claims. These requirements are set out in Rule 23, paragraphs (a) and (b)(3). Only when every requirement is met can a named plaintiff acquire the power to represent an absent plaintiff, as the rule expressly states. Fed. R. Civ. P. 23(a).[3]

It should be obvious that neither a named plaintiff nor an attorney acting for a named plaintiff can waive the requirements of Rule 23. Allowing named plaintiffs or their attorneys to waive the requirements would permit them to conscript absent plaintiffs

[3]It may help to think of Rule 23 as creating an at-law agency relationship between a group of absent plaintiffs, as principals, and a named plaintiff and plaintiff's counsel, as agents/fiduciaries, when such a relationship would be advantageous but cannot practicably be negotiated face-to-face. *See* Charles Silver, *A Restitutionary Theory of Attorneys' Fees in Class Actions*, 76 CORNELL L. REV. 656 (1991)(characterizing class actions in quasi-contractual terms).

at their pleasure.[4] It would be equally improper to permit a named plaintiff, putative class counsel, and a defendant to work a waiver of any Rule 23 requirement by acting together. The relationship established and governed by Rule 23 runs between a named plaintiff, a lawyer seeking to act for a class, and a group of absent plaintiffs. It does not involve a defendant. Consequently, a named plaintiff and plaintiff's counsel can no more waive a Rule 23 requirement via an agreement with a defendant than they can do so by themselves.[5]

A rule allowing a named plaintiff, plaintiff's counsel, and a defendant to modify the requirements of Rule 23 by agreement would make the limiting portions of Rule 23 meaningless and ineffective. If there were only 5 absent plaintiffs--too few to meet the numerosity requirement--the named parties could conscript them by stipulating that 5 is enough or by falsely positing that the number of absent plaintifs is really 500. If a named plaintiff was atypical, the atypical named plaintiff and the defendant could pretend otherwise. If the requirements of

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[4]Continuing the metaphor begun in footnote 3, to permit a named plaintiff and plaintiff's counsel to waive a Rule 23 requirement would be to allow them to authorize themselves to act as absent plaintiffs' agents, eliminating the need either to obtain absent plaintiffs' consent or to meet the requirements for an at-law agency. Obviously, this would be improper. There is no general legal right to appoint oneself agent for another with whom one has no prior relationship.

[5]Finishing the metaphor begun in footnote 3, allowing a named plaintiff and plaintiff's counsel to waive a Rule 23 requirement by agreement with a defendant would be like allowing B and C to authorize B to act as A's agent without A's consent and without meeting the conditions for an at-law agency. Obviously, this would be improper. There is no general legal right for two persons to appoint one of their number the agent of a third party who is a stranger to them.

commonality, predominance, and superiority were not met, a named plaintiff, plaintiff's counsel, and a defendant could meet these requirements by means of contrary-to-fact stipulations. If a named plaintiff or plaintiff's counsel suffered a conflict of interests and could not adequately represent a class, that difficulty too could be erased. A rule giving named plaintiffs and defendants the powers just described would nullify the limiting parts of Rule 23.

Petitioners' contention that judges should consider the fact of settlement when deciding class certification is simply a disguised version of the claim that named plaintiffs and defendants can work together to waive the requirements of Rule 23. It is the assertion that two endpoints of a triangle can conspire against the third. Consider Petitioners' assertion that the predominant common questions needed to satisfy Rule 23 can arise from a settlement. Pet. Br. at 42. The assertion is nothing less than the claim that when individual questions predominate, a named plaintiff and a defendant can stipulate otherwise and bind a class. Permitting this practice would make hash of Rule 23. It would allow named plaintiffs, their lawyers, and defendants to conscript classes whenever it was in their mutual interest to do so, whether or not prosecution of a class action was fair to absent plaintiffs or consistent with other purposes served by Rule 23.

Petitioners' contention that settlements can be the source of typical claims is flawed for the same reason. Pet. Br. at 43. It is the assertion that a named plaintiff and a defendant can create a relationship between a named plaintiff and a class of absent plaintiffs at will. Imagine the conversation that could occur during settlement negotiations: "Typicality lacking? No problem. We'll stipulate that the claims of the named plaintiff and the absent plaintiffs rest on the same theory of recovery."

Similar conversations could eliminate all other difficulties that might be encountered under Rule 23. Instead of grounding the decision to certify a class in the facts of the world, judges following Petitioners' approach would ground their decisions in a make-believe world where contrary-to-fact stipulations are taken as true.

The settling parties disguise their argument by claiming to support "the application of the *same* criteria to settlement classes as are applied to all other classes." They just want trial judges "to consider all of the evidence relevant to" certification, including the fact of settlement and inferences to be drawn therefrom. Class Plaintiffs' Br. at 17-18. This is a ruse. Once judges take settlements into account, the Rule 23 criteria disappear. They cease to perform a limiting function because named plaintiffs and defendants can always negotiate around them. This is clear from the statement, in a sentence immediately following the remarks just quoted, that "the Rule 23 criteria can often be met more easily in the settlement context than in the litigation context . . . because the fact of settlement can increase the commonality of, or eliminate divergences in, class members' interests." Id. "Conflicting interests prevent certification? No problem. We'll agree that class members' interests are really all the same."

Given Petitioners' desire to have federal judges base certification decisions on settlement agreements that contradict actual litigation facts, it is remarkable that they condemn the Third Circuit for requiring judges to perform a hypothetical inquiry. A false assertion is always false. It does not become true when a named plaintiff, plaintiff's counsel, and a defendant endorse it. Thus, the assertion that "exposure to asbestos is a predominant common issue," if false to begin with, does not become true by virtue of being incorporated into a settlement

agreement. Although Petitioners accuse the Third Circuit of ignoring the facts, it is they who do so. They would have judges defer to agreements between named plaintiffs, plaintiffs' counsel, and defendants no matter how distorted or false the factual assertions in those agreements may be. The consequences for absent plaintiffs--live human beings who depend on named plaintiffs and their lawyers for protection--could be devastating, as shown below.[6]

By contrast, the Third Circuit's approach is faithful to the real world, the world in which legal and factual questions are either common or individual, in which interests either align or conflict, in which absent plaintiffs either are many or few. The Third Circuit would apply the same criteria in the same way to all class actions, settled and tried. Is the numerosity requirement met? Find out how many absent plaintiffs there are and whether it is practicable to join them as plaintiffs. Are there predominant common questions of law or fact? Identify the claims and determine the extent of the legal and factual overlap. Is a class action superior? Investigate the size and importance of absent plaintiffs' claims, the extent to which they are in a position to litigate individually, and the intensity of their desire to do so. Will the named plaintiffs adequately represent the class? Determine whether named and absent plaintiffs have important opposing interests, and whether conflicts between absent plaintiffs require separate representation of their interests. Will class counsel be faithful champions of absent plaintiffs' rights? Find out whether the lawyers possess the experience, financial resources, and professionalism needed to handle a class suit, whether their duties to other clients conflict with duties they will owe the class, and whether their financial interest in the lawsuit

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[6] *See* Part III.

will encourage them to maximize the value of absent plaintiffs' claims. District court judges regularly make these determinations when defendants resist class certification. They can easily make the same determinations on the basis of the same information and analysis when absent plaintiffs challenge the proposed certification of settlement classes.

Petitioners' claim that the Third Circuit's approach forces judges to decide hypothetical questions and to ignore facts is specious. The concreteness of an objection to certification depends on the nature of the objection, not on its source or the stage a proceeding has reached. When an objector complains that there are too few absent plaintiffs to satisfy the numerosity requirement, that a named plaintiff is not typical or is otherwise inadequate, or that the requirements of commonality, predominance, and superiority are not met, a judge decides the same question that a defendant challenging certification might have raised, does so on the basis of the same evidence, and reaches an equally concrete conclusion. The inquiry is not hypothetical in any respect.

If anything is true, it is that objections raised by absent plaintiffs are *more* appropriate for judicial resolution than defendants' objections to certification. An objecting absent plaintiff asserts: "You (a named plaintiff) have no right to represent *me*." An objecting defendant asserts: "You (a named plaintiff) have no right to represent *them* (other absent plaintiffs)." Petitioners would have this Court believe that defendants' objections to litigation classes create concrete disputes but that absent plaintiffs' objections to settlement classes embroil judges in hypothetical questions. The truth is exactly the reverse. Defendants' objections entail the greater risk of having judges decide hypotheticals because defendants often oppose class actions that absent plaintiffs would rationally want to

proceed. Judges have always viewed third-party objections with suspicion and have preferred that persons in danger of being injured speak for themselves. Absent plaintiffs' objections are first-party complaints.

II. THE THIRD CIRCUIT'S INTERPRETATION OF RULE 23 WILL NOT UNDULY IMPEDE THE SETTLEMENT OF CLASS ACTIONS.

Petitioners contend that if the Third Circuit's decision stands, class actions will never settle because defendants will never concede that classes are certifiable for trial. This argument also lacks merit. A defendant does not have to concede certifiability for trial to settle a lawsuit as a class action. A defendant need only agree not to contest certification, with the understanding that certification for trial will be an open issue should a proposed settlement fall through. Defendants regularly use this strategy in state and federal courts. It protects them, and it complies with Rule 23.

There is no inconsistency in saying (1) that a single set of certification requirements applies to all class actions, tried and settled, and (2) that a defendant can agree not to contest certification for settlement purposes without conceding certification for trial. Proposition (2) implies only that a defendant can agree not to contest a named plaintiff's showing on certification at a fairness hearing. Proposition (2) does not imply that a defendant's agreement to sit on its hands would prevent absent plaintiffs from opposing certification. Nor does proposition (2) imply that such an agreement would determine, influence, or even bear upon a judge's determination to certify or not certify a class. If the named plaintiff convinces the court that the Rule 23 requirements are satisfied, the court will certify the class for settlement only. If the named plaintiff makes an

inadequate showing or is bested by an absent plaintiff, certification will not occur. Either way, the defendant will not have to concede certifiability for trial and the matter will be determined on the basis of the facts as they actually exist in the world.

The most Petitioners can correctly contend is that a disgruntled absent plaintiff can prevent a defendant from settling claims *en masse* by showing that a proposed settlement class fails to satisfy Rule 23. This is a weak complaint. First, some lawsuits should not be settled or tried as class actions because they do not meet the requirements of Rule 23. Rule 23 does not permit certification whenever a defendant confronts a large number of claims. It permits certification when the number of claims is large *and other enumerated conditions are met*. When the other conditions are not met, judges must deny certification and defendants must find other means of settling claims.

Second, Petitioners' "class actions will never settle" argument overlooks the fact that many class actions settle after contested certifications and that many more are resolved on the merits before or after certification. *See generally* Thomas E. Willging, Laural L. Hooper, and Robert J. Niemic, *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N. Y. U. L. REV. 74, 141 (1996) (hereafter "*Empirical Analysis of Rule 23*"). Petitioners hope to create the impression that unless judges are permitted to take the fact of settlement into account when deciding certification, trial courts will be clogged with class actions that will never go away. This is an exaggeration. If the Third Circuit is upheld, many putative class actions will be resolved on the merits adversely to plaintiffs before certification and the matter of certification will never be reached. Many putative class actions will also settle as non-class cases without a decision on the merits and again prior to certification. Many

cases will be tried on the merits or settled after a contested certification is denied. Many cases will also be tried or settled after a contested certification is granted. If this Court upholds the Third Circuit, it will prevent named plaintiffs, their lawyers, and defendants from using contrary-to-fact settlement stipulations to obtain class certification. But it will not clog district court judges' dockets with stalled class actions. Class actions will be resolved in other, and more proper, ways.

Third, the risk that an objecting absent plaintiff will stall a proposed class settlement is minute. Absent plaintiffs rarely challenge the certifiability of proposed settlement classes. The authors of the Federal Judicial Center's recent empirical study of class actions found that

> [t]he most frequent type of objection [submitted by absent plaintiffs] was to the amount of attorneys' fees as being disproportionate to the amount of the settlement[.] The next most frequent objection . . . related to the insufficiency of the award to compensate class members for their losses. Next in line were objections that the settlement disfavored certain subgroups.

Willging, *et al.*, *Empirical Analysis of Rule 23*, at 141.[7] Objections to certifiability per se did not make the list. When attorneys' fees are reasonable and benefits are good, the vast majority of absent plaintiffs are happy to enjoy the ride.

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[7]The authors continued by noting that "[a] wide variety of objections were grouped in a miscellaneous category. Many of the miscellaneous objections raised serious concerns that were difficult to categorize." *Id.* None of the "miscellaneous" objections related to certifiability. *Id.* at n.274.

The Federal Judicial Center's findings make sense when the economics of objecting are considered. Usually, it is far cheaper to opt out than to object, so rather than complain most disgruntled absent plaintiffs head for the doors. Of those who remain, many will not object to a class action per se. They will merely want more in benefits than a proposed settlement offers them. They will therefore complain about fee requests that give their money to attorneys, about the total size of settlements, and about allocation formulas that give other absent plaintiffs money they want for themselves. But they will not dispute certifiability. Only disgruntled absent plaintiffs who oppose the very idea of a class action will do that. These absent plaintiffs rarely act, however, because the expected payoff from challenging certifiability is most often negative.

To win a certification contest in a substantial class action, an absent plaintiff (or an attorney representing an absent plaintiff) must be prepared to spend hundreds of thousands of dollars or more.[8] Objecting plaintiffs must invest heavily because named plaintiffs (or their attorneys) and settling defendants will vigorously defend their deal, as they have defended this one. Moreover, a successful challenge to certification will not put money in an objector's pocket. It will only enable an objector to continue litigating alone. Only an absent plaintiff with an exceedingly high-value claim (or an attorney representing such a plaintiff or a plaintiff group) will find it economically rational to spend the money needed to obtain this meager reward. Finally, the odds of prevailing on an objection to certification are

[8]The objectors or their attorneys in this case have spent and are continuing to spend substantial amounts of money fighting certification and approval of the proposed settlement class. We repeat that Amici Curiae have received no compensation from counsel for the objectors or any other source with an interest in this case.

tiny, almost vanishingly small.[9] This alone will cause most absent plaintiffs to give up without a fight.

Given the economic irrationality of contesting certifiability, Petitioners' nightmare scenario in which every class action becomes as protracted as *Jarndyce v. Jarndyce*[10] will never materialize. The history of class litigation shows that class actions settle at a very high rate and that objectors rarely succeed in slowing the train, much less derailing it. By affirming the Third Circuit, this Court would not create a new impediment to settlement. This Court would merely recognize the propriety of an existing objection that rarely is used and that succeeds even less frequently. The class action settlement rate will remain high.[11] In truth, the settlement rate will probably be higher than it should be. The economic irrationality of opposing proposed class settlements undoubtedly discourages absent plaintiffs from

[9]Willging, et al., *Empirical Analysis of Rule 23*, at 141 (reporting that in class actions where objections were filed, "[a]pproximately 90% or more of the proposed settlements were approved without changes" and that "[i]n a small percentage of cases, the court approved the settlement conditioned on the inclusion of specified changes").

[10]Charles Dickens, BLEAK HOUSE.

[11]Recent experience in high-dollar class lawsuits suggests that even successful objections merely delay settlement instead of preventing it. For example, after the Supreme Court of Texas rejected the proposed settlement of the General Motors pick-up truck litigation, a new settlement was negotiated and submitted for approval in Louisiana. After Judge Posner reversed a trial judge's decision to certify a nationwide class of hemophiliacs exposed to the AIDS virus by tainted blood products, the parties negotiated a nationwide class settlement which has also been submitted for approval. Absent plaintiffs who wish to challenge these proposed settlements will face expensive, uphill struggles, despite the prior opinions in their favor.

challenging many settlements that, owing to inadequate benefits or a failure to meet the requirements of Rule 23, should not proceed.

III. BY ALLOWING CERTIFICATION FOR SETTLEMENT PURPOSES OF CLASSES THAT COULD NOT BE CERTIFIED FOR TRIAL, THIS COURT WOULD ENCOURAGE THE USE OF PROCEDURES THAT DENY ABSENT CLASS MEMBERS DUE PROCESS OF LAW

This case is the relatively rare one in which plaintiffs with large personal injury claims and a strong interest in controlling their destinies are represented by sophisticated, well-heeled attorneys and are willing to fight class certification. The mere existence of the battle demonstrates two things. First, objections to certification lodged by absent plaintiffs create concrete disputes judges can readily decide, just as they regularly decide the same objections when raised by defendants. This was shown above and is confirmed by the Third Circuit's opinion, which reads like any of the recent opinions federal district court and circuit court judges have written about mass tort cases where certification was contested. Second, it is important to allow absent plaintiffs to dispute certification even though they rarely do. When absent plaintiffs and their attorneys find it worth the time and effort to litigate certification, federal judges should listen to what they have to say.

The danger absent plaintiffs are most likely to complain about (and which is inherent in Petitioners' approach) is that the true parties--the named plaintiffs, their lawyers, and the defendants--are working together against the non-parties--the absent plaintiffs. This danger existed in *Martin v. Wilks*, 490 U.S. 755 (1989), where the true parties in litigation attempted to

use a settlement to extract a benefit from unrepresented third parties and secure it for themselves.[12] This Court permitted the true parties to settle between themselves, but it also allowed the third parties to attack the consent judgment, noting that the third parties' interests would be threatened if the named parties, whose interests conflicted with theirs, were permitted to bind them without their consent. *Martin*, 490 U.S. at 768. See also *Local No. 93, International Ass'n Firefighters v. City of Cleveland*, 478 U.S. 501, 529 (1986).

The danger here is the same. Once a class is properly certified, there is reason to hope the named plaintiffs and their attorneys will adequately represent the absent plaintiffs. But before certification, and especially when absent plaintiffs object to certification, there is a classic trilateral dispute in which the interests of the named plaintiffs, their attorneys, and the settling defendants conflict with those of the absent plaintiffs, and there is a palpable danger that the former will seek to profit at the latters' expense. The cure is to allow the true parties to bind themselves and to allow the non-party absent plaintiffs to challenge certification and test its propriety.

A practice of allowing judges to take settlements into account when deciding whether the requirements of Rule 23 are met would effectively bind absent plaintiffs to agreements reached among named parties and lawyers who have not yet been authorized to represent them and whose interests may strongly

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[12]The problem of third-party exploitation is clearly explained in Samuel Issacharoff, *When Substance Mandates Procedure: Martin v. Wilks and the Rights of Vested Incumbents in Civil Rights Consent Decrees*, 77 CORNELL L. REV. 189, 241-47 (1992); and Douglas Laycock, *Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties*, 1987 U. CHI. LEGAL FOR. 103, 104 (1987).

conflict with theirs. It would prevent them from challenging certification when the danger of inadequate representation is greatest. The result must often be a deprivation of due process, as an examination of the economics of class litigation and this Court's decision in *Hansberry v. Lee*, 311 U.S. 32 (1940), will reveal.

A. Permitting certification of claims that could never be tried as a class action creates economic incentives for class counsel to settle absent plaintiffs' claims too cheaply.

When the Rule 23 requirements are met for trial purposes, a plaintiffs' attorney possesses two important bargaining advantages in settlement negotiations: a credible threat to stick a defendant with an adverse class-wide judgment; and a fee-related interest in trying the lawsuit unless the defendant offers its expected value in settlement. The threat is a club. The desire for the largest possible recovery yielding the largest possible fee award is an incentive to use it. Both advantages disappear when the Rule 23 requirements can be met only in settlement. There can be no threat of an adverse class-wide judgment because the lawsuit cannot be tried as a class, and there can be no incentive to try the case because a trial will predictably yield nothing in fees. A plaintiffs' attorney who can obtain certification only if a defendant agrees to it in settlement is a boxer whose hands are tied.

A plaintiffs' attorney who has no leverage over a defendant may nonetheless pose a real danger to a group of absent plaintiffs, as an example will show. Suppose Plaintiffs 1 through 100 have claims against the same defendant and that each claim is worth an expected $100,000 in a conventional, single-plaintiff

lawsuit.[13] As a group, the claims are worth an expected $10 million in individual trials. Now suppose the following: Attorney 1 is representing Plaintiff 1 for a one-third contingent fee; Attorney 1 files a class action on behalf of all one hundred plaintiffs; the Rule 23 requirements can be met only if the defendant agrees to settle the lawsuit as a class; and the fee award in a class settlement would also be one-third of the recovery.[14] If the defendant makes a low-ball offer to settle the class action for $4 million (40 percent of the expected value of the claims), will Attorney 1 be better off accepting or rejecting the offer? The answer is that Attorney 1 will profit by accepting the low-ball offer. Unless there is a class settlement, Attorney 1 will earn only $33,333, the fee Plaintiff 1's lawsuit is expected to yield. By comparison, a $4 million class settlement would generate a fee of $1,333,333, 40 times as much. Self-interest would therefore lead Attorney 1 to view the low-ball offer favorably, even though it settles the plaintiffs' claims for pennies on the dollar, saving the defendant an expected $6 million.[15]

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[13]The $100,000 figure assumes that appropriate discounts have been made for the risk of losing at trial, the time value of money, and all other relevant factors.

[14]Fee awards in class action settlements range from 20 to 40 percent of the total recovery and average around 33 percent when costs are included. Willging et al., *Empirical Analysis of Rule 23*, at 155; Denise N. Martin, Vinita M. Juneja, Todd S. Foster, Frederick C. Dunbar, *Recent Trends IV: What Explains Filings and Settlements in Shareholder Class Actions?*, National Economic Research Associates, Table 9 (November 1996) (hereafter "*Recent Trends IV*").

[15]It is not necessary to imply that Attorney 1 will actually and consciously collude with the defendant to sell-out the absent plaintiffs. There is no need for actual collusion. Self-interest will motivate the defendant to make an inadequate settlement offer, and self-interest will motivate Attorney 1 to accept it. Collusion is induced by the bargaining

One might think Attorney 1 would hold out for more money because the fee would be even larger if the class were to receive more than $4 million. It is true that Attorney 1 would prefer more money to less, but Attorney 1 cannot extract more money from the defendant because Attorney 1 has no settlement leverage. Attorney 1 cannot threaten the defendant with a $10 million class-wide judgment because the lawsuit cannot be tried as a class. Attorney 1's only threat is that the individual lawsuits will proceed to trial unless the case settles as a class action. That is a weak threat for two reasons. First, Attorney 1 stands to make nothing in fees off the individual cases of Plaintiffs 2 through 100. Attorney 1 must therefore strongly prefer a class action that will yield him a sizeable fee to a series of individual lawsuits that will not. Second, other plaintiffs' attorneys are waiting in the wings. If Attorney 1 rejects the $4 million offer, the defendant can shop it to Attorney 2, to Attorney 3, and so on until someone accepts it. Once another attorney signs on, Attorney 1 will forfeit (all or part of) the meager $33,333 fee to be earned from Plaintiff 1's case if the settlement is approved. As a non-lead attorney in a class action, Attorney 1 will receive little or nothing in fees.

One might also think the suggested low-ball strategy would fail because absent plaintiffs would opt out of an inadequate class settlement. Unfortunately, the right to opt out may fail to protect absent plaintiffs, including those who have large claims, as many in this case do. That is so even though even though the irrationality of settling for 40 cents on the dollar is apparent. The right to opt out is a valuable and potentially effective safeguard only for absent plaintiffs who learn about proposed

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structure. See John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995).

settlements and come to appreciate their importance in time to exclude themselves. Absent plaintiffs who know of their injuries, who receive timely notice, and who are properly educated by their attorneys about the pros and cons of proposed settlements can usually protect themselves. But those who learn about the class action too late or who, being unaware of their exposure to asbestos or the risk of injury they face, fail to understand its importance, will be swept into the class. The Third Circuit was greatly concerned about the adequacy of notice in this case, and what it wrote is directly on the mark. See Cert. App. 55a-56a. Because it is predictable that uninformed plaintiffs, including plaintiffs whose injuries are not yet manifest, will not opt out, defendants can extinguish their claims cheaply by means of a settlement-only class.

What of judicial review? Can judicial scrutiny of proposed class settlements, required by Rule 23(e), protect absent plaintiffs? Regrettably, judicial review is a weak antidote to defective incentives, even though federal judges expend substantial resources and energy scrutinizing class settlements. When bargaining toward settlement, a zealous plaintiffs' attorney will attempt to maximize the amount recovered from a defendant, never settling for less than the expected value of a group of claims at trial. By contrast, a plaintiffs' attorney who is concerned mainly about judicial approval will figure out the smallest settlement a judge will let pass and be content with that. The second number can be considerably smaller than the first because judges' approval thresholds are low. The most recent empirical study shows that judges regularly approve class settlements that return as few as 3 to 5 pennies on the dollar of absent plaintiffs' estimated losses. Martin et al., *Recent Trends IV*, at Figure 3. If individual trials would yield an expected 10 cents on the dollar of estimated loss, a class settlement at 4 cents on the dollar would deprive absent plaintiffs of 60 percent of the

value of their claims. Continuing the example involving Plaintiffs 1 through 100, a defendant could extinguish their claims, worth an expected $10 million in individual trials, by paying $4 million to a class in settlement. A judge would likely approve this low-ball settlement because it is not clearly inadequate under prevailing standards. See Geoffrey C. Hazard, Jr., *The Settlement Black Box*, 75 B. U. L. REV. 1257, 1272 (1995) (concluding that imprudent class settlements are "structurally impervious to enlightened scrutinization from without" and that only clearly inadequate settlements are likely to be disapproved).[16]

B. *Hansberry v. Lee* requires that the interests of named plaintiffs and class counsel align closely with those of absent plaintiffs.

The lesson of *Hansberry v. Lee* is that it would violate due process of law to bind absent plaintiffs to actions taken by representatives whose incentives are defective. In *Hansberry*, the defendants disputed the validity of a racially restrictive covenant. The plaintiffs argued that the defendants were precluded from challenging the covenant, which was tested and upheld in prior class litigation. This Court disagreed, holding that a decision to preclude the second challenge would extinguish the defendants' rights without due process of law. The conclusion rested on this Court's belief that all of the named parties in the first lawsuit who might have been said to represent

[16]Judges have difficulty policing inadequate settlements because they must rely heavily on named plaintiffs, their lawyers, and defendants for information about the merits. Obviously, these persons have no interest in offering evidence that will jeopardize a settlement they support. The job of presenting such evidence is one objectors are uniquely well-placed to perform.

the interests of the defendants in the second lawsuit had defective incentives.

Most of this Court's analysis focused on a conflict of interests within the plaintiff class. The class encompassed all owners of property subject to the covenant. However, it was clear to this Court that the named plaintiffs favored enforcement while some absent plaintiffs, such as the defendants in the second action, opposed it. It was equally clear that the named plaintiffs were inadequate representatives of property owners with whom they disagreed on the essential point in dispute. This Court therefore concluded that allowing the named plaintiffs in the first action to speak for the defendants in the second would deprive the defendants of due process of law.[17]

This Court's analysis of the interests of the defendants in the first action is also important. Both the defendants in the first action and the defendants in the second action opposed enforcement of the covenant. This raised the possibility that the first defendants adequately represented the second defendants. This Court found otherwise for two reasons. First, the first action appeared not to contain a defendant class. Second, the defendants in the first action had faulty incentives. They stipulated that owners of 95 percent of the frontage had signed the covenant even though, in truth, owners of only 54 percent of the frontage had. By entering into this contrary-to-fact stipulation, the defendants in the first action tossed away their most powerful weapon. Their incomprehensible conduct led this Court to describe them as "nominal defendants" whose "interest

[17]*Hansberry*, 311 U.S. at 45 ("Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires.").

in defeating the contract [did not appear to] outweigh[] their interest in establishing its validity." 311 U.S. at 45. In other words, this Court concluded that because the defendants in the first action shared an interest with the plaintiffs in validating the covenant, they were unfaithful champions of the second defendants and did not adequately represent them.

The instant lawsuit combines incentive defects akin to those condemned in *Hansberry*. The class is riven by conflicts of interests that equal the conflict over enforcement of the restrictive covenant in importance. Injury plaintiffs and exposure-only plaintiffs are lumped together, even though the former want as much money as possible paid out today while the latter want as much money as possible paid out in the future. Plaintiffs with moderate injuries like pleural disease, plaintiffs with severe injuries like lung cancer, and plaintiffs with the invariably fatal disease of mesothelioma are all thrown together, even though they (or their survivors) will necessarily differ over how any recovery should be divided. Smokers and non-smokers are jointly represented, even though the former face unique affirmative defenses and arguably should receive smaller payments than the latter. The class includes plaintiffs from different states, ignoring differences in applicable law that might make some plaintiffs' claims more valuable than others'.

The point is not that it is impossible to process the claims of personal injury plaintiffs in a class action. It is that each distinctively different and important interest must be separately and adequately represented in a class suit. Here, plaintiffs possessing important divergent interests are lumped together and represented by a single group of named plaintiffs and a single set of attorneys. "The lack of any structural protections ... thwarted the adequate representation of the disparate groups of plaintiffs," as the Third Circuit observed. Cert. App. 52a. It would

therefore violate the Due Process Clause to permit the actions of the putative class representatives to bind the objecting absent plaintiffs.

The conflict between the absent plaintiffs and putative class counsel in the instant lawsuit is like that between the second defendants and the first defendants in *Hansberry*. Although nominally counsel for the plaintiffs, the attorneys share an overriding interest with the defendants because they cannot secure class certification without the defendants' help. The attorneys can earn a fee off the absent plaintiffs' claims only if there is a class action, and there can be a class action only if the defendants want one. Rather than being adverse to the defendants, putative class counsel is dependent on them. The defendants' offer to settle the lawyers' inventories of existing clients for approximately $200 million in connection with a class settlement made the lawyers even more dependent on the defendants for fees. It would violate due process of law to allow the objecting absent plaintiffs to be represented by attorneys with such defective incentives.

By reversing the Third Circuit, this Court would put its stamp of approval on incentive arrangements that encourage plaintiffs' attorneys and named plaintiffs to be unfaithful champions of the absent plaintiffs they are supposed to protect. The Third Circuit is right in holding that a single set of certification requirements applies to all class actions and on insisting that important diverging interests be separately represented. Only when certification can be obtained without a defendant's help can class counsel be expected to demand in settlement every dollar absent plaintiffs' claims are worth. Only when important divergent interests are given separate voices are settlement proceeds likely to be divided appropriately.

The approach urged by Petitioners would encourage low-value settlements presided over by attorneys who nominally represent a class but who, in reality, are incapable of dealing with defendants at arms' length. It would also encourage settlements that submerge and ignore important differences between absent plaintiffs. The Due Process Clause forbids representatives whose incentives are so demonstrably deficient from binding a group of absent plaintiffs who wish to speak for themselves. That is the lesson and the legacy of *Hansberry v. Lee*.

CONCLUSION

The decision of the Third Circuit should be affirmed.

Respectfully submitted,

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